IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NO. 84-284

NULL MANUFACTURING CO.,

Petitioner,

v.

MAYZELL LITTLEJOHN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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OPINIONS BELOW

The Memorandum and Order filed by the District Court on February 16, 1983, is set forth in the Appendix to the Petition at p. 22a. The Memorandum and Order of the District Court filed May 4, 1983, in response to the Defendant's Motion for Reconsideration is set forth in the Appendix to this Brief at p. 1b.

The opinion of the United States Court of Appeals for the Fourth Circuit filed April 4, 1984, and that Court's Order denying rehearing are set forth in the Appendix to the Petition at pp. 3a and 1a respectively.

STATEMENT OF THE CASE

A. Prior Proceedings--On December 10, 1981, after exhausting administrative remedies, Mayzell Littlejohn ("plaintiff"), a black female, instituted this action against Null Manufacturing Company ("Null" or the "Company") alleging that she was discharged on August 27, 1980, because of her race in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq. and 42 U.S.C. §1981. Trial was held on January 28, 1983.

On February 16, 1983, the District Court filed a Memorandum and Order (Pet. 22a) [1/] with its Findings of Fact (Pet. 23a) and Conclusions of Law (Pet. 37a). The trial court ruled for plaintiff concluding that Null had discriminatorily refused to honor plaintiff's doctor's opinion that plaintiff should be kept away from known irritating chemicals even though the Company had made allowances for whites who had undocumented medical problems and that the Company had refused to assign available and qualified whites to the job of wiping stain to which plaintiff was assigned after her doctor recommended she not work with stain (Pet. 34a, 26a). Specifically, the District Court found (Pet. 35a-36a):

[1/] References to the Petition and the Appendix to the Petition will be "Pet". References to the Appendix to this Brief in Opposition will be "Br. Opp". References to the Joint Appendix filed in the Court of Appeals will be "JA".

> That the Defendant, through its supervisor Mr. O'Leary, intended to (1) question the validity of Plaintiff's allergy and honor the excuse in appearance only, (2) require her, in spite of this condition, to perform work in the area of exposure to known irritants, and (3) enforce its decision not to honor her medical excuse by firing her when she refused to perform the work that triggered her allergy. The Defendant took these three actions while intending: (a) not to require such "medical proof" of physical ailments of her caucasian co-workers and (b) not to require her caucasian co-workers, with undocumented physical ailments, to work in adverse conditions.

On March 15, 1983, Defendant filed a Motion for Reconsideration. The District Court, on May 4, 1983, entered a second Memorandum and Order (Br. Opp. 1b) [2/] denying defendant's motion. Citing and following decisions of this Court, it concluded that plaintiff had presented a prima facie case of racial discrimination and that, while defendant had articulated a legitimate reason for its actions, plaintiff had sustained her ultimate burden of persuasion that defendant's explanation was pretextual and that her termination was racially motivated. The Court stated (Br. Opp. 4b):

> The Court found the Defendant's proferred explanation to be wholly unworthy of any credence. When cross-examined about "business necessity" and "work flow," Mr. O'Leary could only repeat these conclusory words, giving no fact of the employment experience of the Plaintiff's co-workers, their education and skills, the Defendant's production schedules, or work-flow organization charts to support those conclusions. Thus, "indirectly [the Plaintiff] show[ed] that the employer's proffered explanation is unworthy of credence."

On April 4, 1984, the United States Court of Appeals for the Fourth Circuit filed a decision affirming the District Court (Pet. 3a). The Court of Appeals determined the District Court had utilized the proper legal standards and that neither the trial court's findings of fact nor its conclusion that plaintiff's termination was motivated by discriminatory intent were clearly erroneous. Null's petition for rehearing was subsequently denied (Pet. 1a).

[2/] Although the District Court's second Memorandum and Order filed May 4, 1983 further detailed the rationale for its decision, it is not set forth in the Petition.

B. Pertinent Facts--Plaintiff was hired by Null, a furniture manufacturer, on March 27, 1978, as a stain sprayer and wiper (also called "wiping stain"). Plaintiff was transferred to the job of hand sanding on July 28, 1980, and was involuntarily discharged on August 27, 1980.

On two separate occasions, plaintiff had severe physical reactions to the chemicals contained in the stain. On April 23, 1979, plaintiff was treated by Dr. Forrest E. Peeler for a rash on her hand. The Company frequently referred employees to Dr. Peeler for medical evaluations. He was generally regarded as the "Company doctor." (JA 102) Dr. Peeler diagnosed plaintiff's rash as an allergy "thought to be due to allergy to stain." (Pet. 26a; JA 142) He prescribed an anti-allergy medicine.

On July 25, 1980, the plaintiff began to have difficulty breathing and experienced nausea. She returned to Dr. Peeler for treatment. Dr. Peeler concluded that plaintiff's complaints were valid (JA 69) and that her condition was a result of breathing odor from stain sprays (JA 67-68, 142). In a note which plaintiff delivered to the defendant (JA 68, 141), Dr. Peeler advised the defendant that plaintiff was experiencing physical problems because of her breathing stain and reminded the defendant of the rash that the plaintiff had in April 1979 with respect to stain. Dr. Peeler recommended that plaintiff be placed in a job where she would not come in contact with stain.

Dr. Peeler had treated many employees of the defendant prior to July 1980. A number of those employees whom Dr. Peeler had seen prior to July 1980 (in excess of ten) had experienced reactions to chemicals used at Null's plants. Dr. Peeler testified (JA 70) that in all prior cases the defendant had followed his recommendations for treatment to alleviate the problems with chemicals without questioning the validity of his diagnosis (Pet. 26a).

The plaintiff's supervisor as of July 25, 1980, was J. D. O'Leary. The plaintiff gave O'Leary the note from Dr. Peeler indicating that on two occasions she had physical reactions to

stain and recommending that she be placed in a job where she would not come in contact with stain (JA 19). Plaintiff had previously told O'Leary that the stain was making her ill (JA 148), and he acknowledged that she had a "reaction" (JA 19) to stain.

O'Leary telephoned Dr. Peeler who read and explained the note he had given the plaintiff (Pet. 6a; JA 149). Dr. Peeler told O'Leary that "stain made her sick and she couldn't work in it" (JA 149). Despite the doctor's advice O'Leary unilaterally determined the diagnosis was not a "medical fact" (JA 151-152). Nonetheless, on July 28, 1980, O'Leary transferred plaintiff to the position of hand sander, a job which did not require the plaintiff to come in contact with stain (JA 21). The transfer was made reluctantly by O'Leary, and plaintiff was told on July 28 that if she asked for anything else she was "going out the door, and that was it" (Pet. 7a; JA 49).

Wiping stain was generally regarded as an unattractive and less desirable job. Sometime after O'Leary began to work for Null, he allowed Connie Morrow (white) to transfer from wiping stain to a more desirable job in a cleaner area (JA 28-29). No evidence was presented that Morrow had a medical reaction to stain.

After the plaintiff was moved from wiping stain to sanding, she experienced no physical problems (A. 63-64). During the period from July 28, 1980 to August 27, 1980, six employees worked in sanding: Lester Taylor, Connie Morrow and Frances Wilkerson (all white), Janester Henry and Helen Kee (both black) and the plaintiff. From July 28 to August 26, Henry and Kee were required to wipe stain even though wiping stain was not part of their usual job duties. No whites were required to wipe stain during this period (Pet 8a; JA 51-52).

On August 27, 1980, an employee whose job was to wipe stain had to leave the plant early. O'Leary directed the plaintiff to wipe stain even though he knew that plaintiff's doctor had recommended she not be asked to come into contact with the

chemicals in stain (JA 23) and even though there were available at least three white employees working as sanders, Taylor, Morrow, and Wilkerson, and two other white employees working nearby, Roberta Boles and Jettie Hoyle, all of whom were qualified and able to wipe stain and none of whom had a history of allergy to the chemicals in stain (Pet. 7a, 31a). When asked to wipe stain, the plaintiff explained again to O'Leary that she should not wipe stain because she was allergic to the chemicals in stain and reminded him of the letter she had brought from Dr. Peeler (JA 53). O'Leary immediately terminated the plaintiff (Pet. 30a).

When asked at trial why he had not assigned Taylor, a white, to wipe stain, O'Leary responded only that he had made a "business decision" and that, even though Taylor previously worked as a stainer, he assertedly had "bad eyes" (JA 23-25). There was no medical evidence or documentation in Taylor's file to indicate any eye problem (JA 26), and O'Leary admitted he was not familiar with Taylor's medical or work background (Pet. 8a, 30a; JA 25). When asked why the other white employees who were well qualified to wipe stain were not asked to do so, O'Leary responded that those employees were doing jobs that needed to be done at the time. He admitted however that some of the whites were sanders like the plaintiff; that the plaintiff was qualified to perform the jobs that the white employees who were not allergic to the chemicals in the stain were performing; and that he could have moved the plaintiff to another employee's job (not requiring contact with stain) and still kept the "work flow" going (Pet. 31a, 34a; JA 27-38).

When questioned why plaintiff, the only employee who had problems with stain, was asked to wipe stain when there were many others who had no intolerance to the chemical available to do so (including other sanders), O'Leary spoke of "work flow" and his "business decision" (JA 24, 37, 160). When asked why plaintiff was required to wipe stain despite a recommendation from her

doctor to the contrary while all other employees with reactions to chemicals had previously been removed from contact with the offensive materials on Dr. Peeler's advice, O'Leary offered no explanation (JA 87).

When O'Leary told plaintiff she was fired, plaintiff continued to work as a sander (JA 82-83). Plaintiff reminded him about Dr. Peeler's previous statement and her illness, but her time card was pulled and punched (JA 53). The plaintiff asked for, but was denied, permission to use the telephone to get a ride home, left the plant, and walked three miles home (JA 52, 116).

At the time of plaintiff's discharge, Null used a "progressive disciplinary system" (JA 128). Under that policy, a written warning is given to an employee who violates for the first time the rule prohibiting "(a) refusing assigned job or walking off the job" (JA 129). Discharge is the stated penalty only for a second violation of this rule. Plaintiff testified and the Court found that plaintiff was given no warning for refusing to do an assigned job prior to August 27, 1980 (JA 114, Pet. 31a-32a).

REASONS FOR DENYING THE WRIT

The decision below is correct and consistent with the rulings of this Court. Petitioner has presented no issue meriting review.

A. CERTIORARI IS INAPPROPRIATE AS THE PETITION ESSENTIALLY REQUESTS THIS COURT TO REVIEW THE EVIDENCE ONCE AGAIN.

As the Company admits, this was a fact-sensitive case which required the District Court to resolve credibility issues and determine the motivation of the employer. For example, although the employer argued no one other than Ms. Littlejohn was available to wipe stain, the District Court found the evidence was otherwise and the Court of Appeals upheld that finding of fact. This Court "do(es) not grant a certiorari to review evidence and discuss specific facts", United States v. Johnson, 268 U.S. 220, 227 (1925), especially where, as here, two lower courts have concurrently agreed upon the facts. Graver Tank and Mfg.Co. v.

Linde Air Products Co., 336 U.S. 271, 275 (1949).

B. PETITIONER PRESENTS NO IMPORTANT ISSUE CONCERNING FEDERAL ANTI-DISCRIMINATION LAW

Petitioner does not allege any conflict among the circuits concerning any legal issue, and Respondent is aware of none. While Petitioner contends this case demonstrates a "frequent error" made in the area of employment discrimination (Pet. 14), it cites no other cases where such alleged error has surfaced.

The determination of intent and motivation in discrimination cases is a "pure question of fact subject to Rule 52(a)'s clearly erroneous standard," Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982). The courts below cited and correctly followed (Pet. 10a-13a; Br. Opp. 2b-4b) this Court's decisions which have established a method of determining such facts. See McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

The analysis suggested in McDonnell-Douglas and Burdine is designed to assist the trial court in deciding "which party's explanation of the employer's motivation it believes." United States Postal Service Board of Governors v. Aikens, ____U.S.____, 75 L.Ed.2d 410, 411 (1983). It is the accepted method to be used by a trial court in deciding whether race influenced the challenged decision. As this Court stated in Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978):

> A prima facie case under McDonnell-Douglas raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.... And we are willing to presume this largely because we know from our own experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons...have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race.

Thus, the method of analysis established in McDonnell-Douglas and Burdine and most recently approved yet again in Aikens is not

an evaluation to be made after the issue of race is demonstrated but rather is the very analysis which is to be used to determine if a challenged decision was made "because of race." If a plaintiff can show a prima facie case of race discrimination and, as here, show that all of the defendant's articulated reasons for its action are false, then the courts have indicated that as a matter of law it is presumed that race motivated the employer and the plaintiff should prevail.

Null "articulated" only one reason for its admitted disparate treatment of the plaintiff "business necessity--work flow" (Br. Opp. 4b). It was the duty of the District Court to evaluate the parties' arguments in light of the specific arguments advanced by the employer. Lanphear v. Prokop, 703 F.2d 1311, 1314-1317 (D.C. Cir. 1983). As the Lanphear Court emphasized, the purpose of the allocation rules established in McDonnell- Douglas and Burdine is to "focus the issues and provide plaintiff with a 'full and fair opportunity' to attack the defendant's purported justification. That purpose is defeated if defendant is allowed to present a moving target or...conceal the target altogether." Id. at 1316. Once plaintiff showed that reason to be pretextual, the trial court should not "speculate upon evidence not admitted at trial" (A. 211), Burdine, supra at 255, n.9, and thus the district court below properly held for plaintiff. There is simply no authority for the Company's suggestion that some other unarticulated test should be substituted for the analysis consistently approved by this Court and used below to determine if a challenged action was "because of race."

C. THE DECISION BELOW IS SUPPORTED BY THE EVIDENCE

Plaintiff presented a prima facie case of disparate treatment. The Company so admitted in its motion for reconsideration:

> In its Memorandum, the Court found and concluded that without requiring "medical proof" of Taylor's ailment, O'Leary chose not to require Taylor "to work in adverse conditions" - but that on the other hand O'Leary chose to doubt and to "question the validity of" the Plaintiff's allergy, and did not "honor her medical excuse," but instead required her "to perform work in the area

> of exposure to known irritants," and finally discharged her "when she refused to perform the work that triggered her allergy." (Memorandum, p. 6). In this Motion, the Defendant raises no question but that these findings are within the fact-finding province of the Court (JA 182).
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> .
>
> As stated above, the Court has made findings, which this Motion does not contest, that the Defendant, through its supervisor O'Leary, did not deal even-handedly as between the Plaintiff and her fellow employee Taylor, but instead imposed unfairly disparate treatment upon the Plaintiff to her detriment and harm. There was thus an unfair discrimination by the Defendant against the Plaintiff (JA 183).

The Company articulated as its defense that only plaintiff was available to wipe stain and that it was justified in requiring her to take action which threatened her health because of "business necessity - work flow." Plaintiff successfully rebutted Null's "articulation" and demonstrated that the Company's admitted discrimination was racially motivated by showing (1) that the Company had readily followed Dr. Peeler's recommendations on all other occasions where employees had allergies to chemicals; (2) that O'Leary responded to plaintiff's medical problem with singular harshness; (3) that plaintiff was ordered to wipe stain on August 27, 1980, even though there were at least four non-allergic white employees who were qualified and available to wipe stain and whose jobs plaintiff could perform without harming work flow; (4) that the Company accepted the undocumented medical limitations of a white (Taylor) while refusing to adhere to Dr. Peeler's clear advice concerning the plaintiff; and (5) that plaintiff was fired contrary to Null's published work rules which required at least one warning if an employee refused to perform assigned work.

The District Court concluded this evidence of disparate treatment demonstrated intentional racial discrimination (Pet. 36a), and the Court of Appeals held the trial Court's findings were not erroneous (Pet. 10a). The defendant contends the

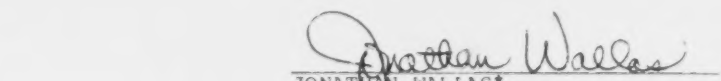
District Court failed to make the requisite finding of intent and quotes an alleged conflicting portion of Paragraph 5 of the Conclusions of Law (Pet. 23). However, Paragraph 5 embodies the District Court's conclusion that punitive damages should not be awarded (Pet. 39a). The words "willfully" and "clear purpose" used in that paragraph refer to the more stringent burden the plaintiff needed to carry to obtain punitive damages and should be read in its context. The rationale of the District Court is abundantly clear. It specifically found the defendant had acted intentionally (Pet. 26a), and the defendant admitted "unfair discrimination" (JA 183). 3/

The trial court did not believe Null's explanation for its conduct, and the evidence discussed herein shows ample support for the finding of discrimination. It is not the role of this Court to retry factual issues, and it should not do so here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,



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September 14, 1984

3/ The defendant also cites the EEOC findings. However, District Court Title VII trials are de novo proceedings, Chandler v. Roudebush, 425 U.S. 840 (1976). The EEOC determination here (Pet. 41a) is merely conclusory and is not binding.

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION

ST-C-81-143

FILED
STATESVILLE, N. C.

MAY 4 1983

U. S. DISTRICT COURT
WESTERN DISTRICT OF N.C.

MAYZELL LITTLEJOHN,

Plaintiff,

vs.

NULL MANUFACTURING CO.,

Defendant.

MEMORANDUM AND ORDER

THIS MATTER is before the Court for ruling upon the Defendant's motion to alter or amend the Judgment entered on February 16, 1983, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, and for ruling upon the Plaintiff's motion, as amended, for attorneys' fees, pursuant to 42 U.S.C. §2000e-5(k), 42 U.S.C. §1981, and pursuant to the Judgment of this Court.

The Court, having reviewed the memoranda of law and affidavits submitted by counsel, and being of the opinion that the Judgment entered on February 16, 1983 should not be altered or amended, and being further of the opinion that the Plaintiff should be reinstated, awarded the back pay agreed upon by the parties, with pre-judgment interest and without reduction for AFDC payments, and awarded costs and reasonable attorneys' fees, enters the following Memorandum and Order:

DISCUSSION

I. Motion to Alter or Amend the Judgment

The Defendant contends that this Court must vacate its Judgment for the Plaintiff because:

(a) there was no direct evidence of personal racial animus on the part of Mr. O'Leary or Mr. Gamble,

(b) there were no statistics of racially discriminatory hiring or promotion practices,

(c) there was no evidence of bias in the employment application process, and

(d) "[t]here may have been an unlimited variety of considerations, unreasonable and unfair, which caused Mr. O'Leary to discriminate against the Plaintiff" (Defendant's Memorandum, p. 7).

The Defendant's position appears to be two-tiered: (1) the Court's finding of a prima facie case was erroneous for lack of direct evidence of discriminatory motivation, and (2) the Court's ultimate factual finding was erroneous because there were "unlimited" possible non-discriminatory reasons for the discharge of the Plaintiff.

First, direct proof of discriminatory motivation is not required for the presentation of a prima facie case under 42 U.S.C. §2000e. See, United States Postal Service Bd. of Governors v. Aikens, 51 U.S.L.W. 4354 (No. 81-1044, April 4, 1983); International Brotherhood of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977).

Second, the statistics, to which the Defendant refers in his argument, are customarily offered in a disparate impact case, to provide the discriminatory effect of facially neutral

employment standards upon minorities. The case at bar, however, is a disparate treatment case, and the Court has found that the Plaintiff presented sufficient evidence (detailed in the Court's Memorandum) of treatment which created the rebuttable presumption that of the "unlimited" possible reasons for the treatment, the employer was in fact motivated by an unlawful discriminatory reason. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981).

At trial, the Defendant presented evidence that the disparate treatment occurred for a "legitimate, nondiscriminatory" business purpose.

> "At this stage, the McDonald-Burdine presumption 'drops from the case' and 'the factual inquiry proceeds to a new level of specificity.'
>
> * * *
>
> As we stated in Burdine:
>
> > 'The plaintiff retains the burden of persuasion. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.' 450 U.S., at 256.
>
> In short, the district court must decide which party's explanation of the employer's motivation it believes.
>
> All courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult. The prohibitions against discrimination contained in the Civil Rights Act of 1964 reflect an important national policy. There will seldom be 'eyewitness' testimony as to the employer's mental processes."

United States Postal Service, supra at 4355-4356. (citations in text other than lengthy quote from Burdine omitted).

The Court found the Defendant's proffered explanation to be wholly unworthy of any credence. When cross-examined about "business necessity" and "work flow," Mr. O'Leary could only repeat these conclusory words, giving no facts of the employment experience of the Plaintiff's co-workers, their education and skills, the Defendant's production schedules, or work-flow organization charts to support those conclusions. Thus, "indirectly [the Plaintiff] show[ed] that the employer's proffered explanation is unworthy of credence."

Although the Defendant in its motion, ruminates over the "unlimited variety of considerations, unreasonable and unfair, which could have caused" the Plaintiff's discharge, the Defendant proffered only one reason at trial: business necessity - work flow. The Court would not be called upon in any other type of litigation to speculate upon evidence not admitted at trial, and declines to do so in this case. The Plaintiff sustained her burden of presenting a rebuttable prima facie case of discrimination; the Defendant produced evidence of one "legitimate, non-discriminatory reason" for the disparate treatment; and the Plaintiff again sustained her burden of persuasion that this proffered reason was pretextual. Thus, the Plaintiff has prevailed in her case, and the Court will now address the remedy issue.

II. Appropriate Remedy

The Judgment entered decrees that "the Plaintiff is entitled to...back wages, reinstatement, lost compensation, and attorneys' fees." (Memorandum and Order, p. 7). The Court finds reinstatement appropriate in this case, particularly in light of the Plaintiff's affidavit, filed March 7, 1983, stating her willingness and readiness to return to her work with the Defendant. This is consistent with her testimony at trial, when she discussed her friendships with her co-workers.

The parties have agreed as to the amount of Plaintiff's back wages:

DATE		AMOUNT
August 27, 1980 - December 31, 1980	- -	$1,978.00
1981	- -	$6,922.32
1982	- -	$9,525.34
January 1, 1983 - February 26, 1983	- -	$1,632.04
each week after February 26, 1983	- -	$ 204.00
(7 weeks through April 15, 1983, $1,428.00)		
TOTAL	- -	$21,485.70

The Defendant contends that because the Plaintiff received, on the behalf of her children, benefits under Aid to Families with Dependent Children Act, N.C. Gen. Stat. §108.38 et seq. (1978), repealed and recodified N.C. Gen. Stat. §108A-27 et seq. (Supp. 1981)), the back pay award should be reduced by the

amount of this public assistance. The Court finds this contention repugnant to the policies underlying the program of Aid to Familes with Dependent Children and the Civil Rights statute, which provides:

> "[i]nterim earnings or amounts earnable with reasonable diligence by the person...discriminated against shall operate to reduce the back pay otherwise allowable."

42 U.S.C. §2000e-5(g). (Emphasis added).

Payments from federal and state tax funds to provide a subsistence level of food and clothing for children do not constitute "earnings" under 42 U.S.C. §2000e-5(g). The deprivation of an "adequate means of support" for the children of a victim of discrimination is a collateral loss, not compensated by the Civil Rights Act. Similarly, the AFDC payments are collateral benefits which should not be considered in reducing the compensation award under 42 U.S.C. §2000e-5(g). The Court finds that the Plaintiff will not be made "more than whole" by this decision. See, NLRB v. Gullett Gin Co., 340 U.S. 361, 364 (1951) (The Court refused to reduce an NLRA award by the amount of unemployment compensation received by the plaintiff); EEOC v. Ford Motor Co., 645 F.2d 183, 195-196 (4th Cir. 1981), rev'd on other grounds, 50 U.S.L.W. 4937, 73 L.Ed 2d 721 (No. 81-300, June 28, 1983). (The Fourth Circuit refused to reduce a Title VII back pay award by the amount of unemployment compensation received by the plaintiff), quoting Abron v. Black & Decker Manufacturing Co., 439 F.Supp. 1095, 1115 (D. Md. 1977); Gurmankin v. Maicase, 23 E.P.D. ¶31,119 (E.D. Pa. 1980). (The

court refused to deduct public assistance benefits from a Title VII back pay award).

"Back pay must be allowed from the time an employee is denied an employment opportunity until [s]he actually receives it....the award...shall...continue until the employee is [placed in] the job to which...[s]he is entitled." EEOC v. Korn Ind., Inc., 662 F.2d 256 (4th Cir. 1981), citing Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir. 1976), cert. denied, 429 U.S. 920 (1976). Thus, this Court's award of back pay will continue until the Plaintiff is actually reinstated, at the rate agreed upon by the parties, $204.00 per week.

The Plaintiff has requested pre-judgment interest under N.C. Gen. Stat. §24-1 (Supp. 1981), up to the date of judgment, and post-judgment interest pursuant to 28 U.S.C.A. §1961(a) (West Pamphlet No. 1, June, 1982). The Fourth Circuit has recently approved a discretionary award of pre-judgment interest under the North Carolina statute in a Title VII case. EEOC v. Liggett & Myers, Inc., 690 F.2d 1072, 1074-1075 (4th Cir. 1982). See also, Marshall v. Bd. of Ed., 470 F.Supp. 517 (D.Md. 1979), aff'd without opinion, 618 F.2d 101 (4th Cir. 1980). Therefore, this Court awards the Plaintiff pre-judgment interest at the rate of 8% "from the time the action [was] instituted" (December 10, 1981) until the date of this amended judgment. (N.C. Gen. Stat. §24-5 (Supp. 1981)). From the date of this amended judgment until such judgment is paid and satisfied, the Plaintiff shall receive 8.98% interest (28 U.S.C.A. §1961(a) (West Pamphlet No. 1, June, 1982)).

The Judgment entered awarded but did not quantify Plaintiff's attorneys' fees. The Fourth Circuit has outlined the factors to be considered in such calculation:

> "first ascertain the nature and extent of the services supplied by the attorney[s] from a statement showing the number of hours worked and an explanation of how these hours were spent. The court should next determine the customary hourly rate of compensation....The court should then multiply the number of hours reasonably expended by the customary hourly rate to determine an initial amount for the fee award. Finally, the court should adjust the fee on the basis of the other factors, briefly explaining how they affected the award."

Anderson v. Morris, 658 F.2d 246, 249 (4th Cir. 1981). (Emphasis added). The adjusting factors are detailed in Barber v. Kimbell's Inc., 577 F.2d 216, 226 n.28 (4th Cir. 1978) and Anderson, supra at 248 n.2.

Plaintiff's counsel have submitted their itemized record of hours spent by three attorneys and a list of expenses incurred in this case. The record documents that no duplication of labor was included and that the rates charged are customary for their field of practice and for the relevant geographical area: $110/hr. for lead counsel, Mr. Chambers, $90/hr. for the assistance of one of his partners, Mr. Wallace, and $60/hr. for the substantial contribution of a junior member of the firm, Ms. Glazer. Counsel amended its record to be current as of March 23, 1983. However, on April 11, 1983, Mr. Wallace submitted additional authority for the Plaintiff's response to the Defendant's "Motion for Reconsideration." The Court has assigned .5 hour at Mr. Wallace's rate for that submission. The Court, concludes that the base figure for the attorneys' fee award in

this case is $8.955.00, excluding costs and expenses, totaling $918.00 (having been increased slightly for mailing and photocopying the April 11th submission).

The Court has reviewed the adjusting factors and concludes that the primary factors in favor of a moderate increase in the award are:

(a) the wholly contingent nature of the case and the importance to society of firms willing to accept such cases;

(b) the preclusion of fee-based cases, while the attorneys worked on this case;

(c) the perceived undesireability of litigating Title VII cases, particularly when the injured party has no funds whatsoever to give counsel;

(d) the skill, experience, and reputation of counsel, efficiently and concisely presenting the case in the pre-trial brief and at trial;

(e) the results obtained and amount in controversy, counsel has been successful in obtaining for its client all the relief sought; and

(f) the fee allowed here is well within the reasonable range of Title VII attorneys' fee awards in similar cases.

The factors moderating that increase are:

(a) the absence of extreme novelty or difficulty of the legal issues in the case

(c) the absence of unreasonable time demands sometimes experienced in complex litigation.

Since the Plaintiff is a one-time client, the factor of professional relationships is not relevant.

In conclusion, the Court declines to award the 1.5 multiplier sought by Plaintiff's counsel, finding reasonable attorneys' fees through April 15, 1983 to be $11,977.20. The expenses to be recovered are $918.00.

IT IS, THEREFORE, ORDERED that:

(1) The Defendant's motion to alter or amend the Judgment entered February 16, 1983 is DENIED;

(2) The Plaintiff, pursuant to the Judgment, be immediately reinstated by the Defendant and have and recover of the Defendant $21,485.70 in backpay continuing $204.00 per week until reinstatement is effected;

(3) The Plaintiff receive pre-judgment interest from December 10, 1981 to the date of this Order at the rate of 8% per annum and receive post-judgment interest from this date until paid and satisfied at the rate of 8.98% per annum;

(4) Plaintiff's counsel receive $11,977.20 for attorneys' fees and $918.00 for costs and expenses.

This the 2nd day of ~~April~~ May, 1983.

ROBERT D. POTTER
UNITED STATES DISTRICT JUDGE